

Date: September 3, 2014

To: Central Valley Regional Water Quality Control Board

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**Submission of Evidence and Policy Statement regarding Hearing on
Administrative Civil Liability Complaint R5-2014-0543**

A. Introduction.

We are James G. Sweeney and Amelia M. Sweeney, doing business as Sweeney Dairy, and are the "Dischargers" named under the Central Valley Regional Water Quality Control Board's Administrative Civil Liability Complaint R5-2014-0543(2014 Complaint). Our address is 30712 Road 170, Visalia, CA 93292. Our telephone number is (559) 280-8233 and our email address is japlus3@aol.com. The Central Valley Regional Water Quality Control Board shall hereinafter be referred to as the "Regional Board," and the "Board." The State Water Resources Control Board shall hereinafter be referred to as the "State Board."

B. Statement of Facts/Background.

1. We operate a small dairy at 30712 Road 170, Visalia, CA. We milk around 260 cows on a site where a dairy has continuously been conducted for over eighty years.
2. The Regional Board's Order No. R5-2007-0035 (2007 Dairy Order) ordered us, along with all other dairymen, to prepare and file Annual Reports with the Regional Board by

July 1 of the year following the year to which the Reports applied, commencing with July 1, 2010.

3. Because of our financial inability and other legal grounds, we asked the Regional Board for relief from the obligation to file the 2009 Annual Report due on July 1, 2010. But these requests were ignored by the Board. We did not file the Report due on July 1, 2010.
4. On May 5, 2011 an Administrative Civil Liability Complaint, R5-2011-0562, (2011 Complaint) was mailed to us for failing to file the 2009 Annual Report due on July 1, 2010. The 2011 Complaint sought to assess a civil liability against us in the amount of \$11,400.00.
5. On July 1, 2011, the 2010 Annual Report became due, but we did not file it because we were still seeking a hearing before the Regional Board to obtain relief from having to file these Annual Reports.
6. We appeared at the hearing on the 2011 Complaint before the Regional Board on October 13, 2011. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2011-0068, assessing an administrative civil liability of \$11,400.00 on us for failing to file the Report due July 1, 2010.
7. On November 9, 2011, we appealed the Regional Board's October 13, 2011 decision by filing a Petition for Review with the State Board (A-2190). Said petition/appeal is still pending decision before the State Board.
8. On May 4, 2012, the Regional Board mailed us a "Groundwater Monitoring Directive," ordering us to install either (a) an individual groundwater monitoring well system at our dairy, or (b) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities.
9. On May 9, 2012 an Administrative Civil Liability Complaint, R5-2012-0542 (2012 Complaint), was mailed to us for failing to file the 2010 Annual Report due on July 1, 2011. The 2012 Complaint sought to assess a civil liability against us in the amount of \$7,650.00.
10. On May 30, 2012, we filed a Petition for Review with the State Board appealing the Regional Board's adoption of the foregoing Groundwater Monitoring Directive. (A-2213) Said petition/appeal is still pending decision by the State Board.
11. The Regional Board held its hearing on the 2012 Complaint on August 2, 2012. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2012-0070, assessing an administrative civil liability of \$7,650.00 on us for failing to file the 2010 Annual Report due July 1, 2011.

12. On August 26, 2012, we appealed the Regional Board's August 2, 2012 decision, including its Order No. R5-2012-0070, by filing a Petition for Review with the State Board. (A-2225) Said petition/appeal is still pending decision before the State Board.
13. On November 6, 2012 the Court of Appeal for the Third Appellate District reversed the trial court's decision regarding a challenge to the 2007 Dairy Order, and remanded it back to the trial court.¹ On April 16, 2013, the Trial Court ordered the 2007 Dairy Order set aside.²
14. On May 9, 2013 an Administrative Civil Liability Complaint, R5-2013-0539 (2013 Complaint), was mailed to us for failing to file the 2011 Annual Report due July 1, 2012. The Complaint sought to assess a civil liability against us in the amount of \$20,400.
15. On July 25, 2013, the Regional Board held their hearing on the 2013 Complaint. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2013-0091, assessing a civil liability of \$15,000.00 on us for failing to file the 2011 Annual Report due July 1, 2012.
16. On August 21, 2013, we appealed the Regional Board's July 25, 2013 decisions, including its Order No. R5-2013-0091, by filing a Petition for Review with the State Board. (A-2267) Said petition/appeal is still pending decision before the State Board.
17. On July 17, 2014, an Administrative Civil Liability Complaint, R5-2014-0543 (2014 Complaint), was mailed to us for failing to file the 2012 Annual Report due July 1, 2013. The 2014 Complaint seeks to assess a civil liability against us in the amount of \$18,564.00. This Statement is submitted in connection with our opposition to the 2014 Complaint.
18. As already stated, our appeals of the decisions/orders taken by the Regional Board in connection with the 2011 Complaint, 2012 Complaint, 2013 Complaint and of the Groundwater Monitoring Directive are still pending before the State Board. We had been waiting the exhaustion of our appeal rights to determine whether the Regional Board's 2007 Order was lawful and enforceable. It has been our position that if the completion of the appeal process concluded with a determination that we had no legal grounds upon which to not file the Annual Reports due in 2010, 2011, 2012 and 2013, then we would file them. We should not be treated as responsible for the State Board sitting on these appeals without acting upon them. It is the State Board that is depriving us of a resolution of these issues and is denying us due process.

¹ *Asociacion de Gente Unida por el Agua, et al., v. Central Valley Regional Water Quality Control Board*, (2012) 210 Cal. App. 4th 1255.

² *Asociacion de Gente Unida por Agua, et al., v. Central Valley Regional Water Quality Control Board*, Superior Court of the State of California, County of Sacramento, Case No. 34-2008-00003604CU-WM-GDS.

C. Documents/Evidence.

We are required to identify and provide all documents and other evidence that we intend to use or rely upon at the hearing. At the present time we intend to use or rely upon the following, which we identify and submit by reference because they are believed to already be in the files or otherwise in the possession of the Regional Board:

1. Regional Board's Report of Compliance Inspection for Sweeney Dairy, dated December 31, 1998.
2. Regional Board's Inspection Report letter for Sweeney Dairy, dated April 7, 2003.
3. Letter from the Regional Board to us, dated October 15, 2003, regarding our groundwater supply well test results:

Irrigation Well #1	Nitrate (NO ₃)	2.0 mg/L
Domestic Well	" "	3.2 mg/L
4. Certificate of Analysis from BSK Laboratories to us, dated November 6, 2007, regarding our groundwater supply well test results:

Irrigation Well #1	Nitrate (NO ₃)	1.1 mg/L
Irrigation Well #2	" "	1.2 mg/L
Domestic Well	" "	3.2 mg/L
5. Reports from FGL Environmental to us, dated July 14, 2010, regarding our groundwater supply well test results:

Irrigation Well #1	Nitrate (NO ₃)	1.1 mg/L
Irrigation Well #2	" "	.2 mg/L
Domestic Well	" "	1.4 mg/L
6. Dairy Inventory Worksheet, dated December 12, 2009, prepared by us for Farm Credit West.
7. Jim Sweeney's letter to the Regional Board, dated March 28, 2010.
8. Jim Sweeney's letter to the Regional Board, dated April 7, 2010.
9. Regional Board's letter to the Sweeneys, dated June 15, 2010.
10. Jim Sweeney's letter to the Regional Board, dated June 27, 2010.

11. Regional Board's Notice of Violation sent to the Sweeneys on August 16, 2010.
12. Jim Sweeney's letter to the Regional Board dated August 22, 2010.
13. Regional Board's letter to Sweeneys from Clay Rodgers dated May 5, 2011 re Administrative Civil Liability Complaint R5-2011-0562.
14. Administrative Civil Liability Complaint, R5-20011-0562, (2012 Complaint) against James G. and Amelia M. Sweeney, dated May 5, 2011(together with all attachments, including the Hearing Procedures).
15. Jim Sweeney's letter to the Regional Board, dated May 15, 2011.
16. Jim Sweeney's letter to the Regional Board, dated May 31, 2011.
17. Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 8, 2011, regarding 2011 Complaint.
18. Transcript of July 14, 2011 hearing before the Hearing Panel regarding the 2011 Complaint.
19. Jim Sweeney's letter to Alex Mayer (Regional Board's legal counsel) dated September 5, 2011.
20. Email from Alex Mayer to Jim Sweeney, dated September 20, 2011.
21. Jim Sweeney's letter to Alex Mayer, dated September 21, 2011.
22. Email from Alex Mayer to Jim Sweeney, dated September 29, 2011
23. Second email from Alex Mayer to Jim Sweeney, dated September 29, 2011.
24. Jim Sweeney's letter to Alex Mayer, dated September 30, 2011.
25. Sweeneys' Written Testimony and Arguments to the Regional Board, dated October 2, 2011.
26. Transcript of hearing held on October 13, 2011 before Regional Board regarding the 2011 Complaint.

27. Email from Ken Landau to Jim Sweeney, dated October 25, 2011.
28. Sweeneys' Petition for Review to the State Board regarding the Regional Board's decisions at the October 13, 2011 hearing on the 2011 Complaint.
29. Groundwater Monitoring Directive from the Regional Board to Sweeneys, dated May 4, 2012.
30. Letter from Douglas Patteson to Sweeneys, dated May 23, 2012.
31. Email from Clay Rodgers to Jim Sweeney, dated May 27, 2012.
32. Sweeneys' Petition for Review to the State Board, dated May 30, 2012, regarding the Groundwater Monitoring Directive.
33. Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 20, 2012, regarding the 2012 Complaint.
34. Transcript of hearing held on August 2, 2012 before the Regional Board regarding the 2012 Complaint.
35. Sweeneys' Petition for Review to State Board, dated August 26, 2012, regarding the Regional Board's decision at the August 2, 2012 hearing on the 2012 Complaint.
36. Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 6, 2013, regarding the 2013 Complaint.
37. Sweeneys' Petition for Review to the State Board, dated August 21, 2013, regarding an appeal of the Regional Board's decision at the July 25, 2013 hearing on the 2013 Complaint.
38. Order No. R5-2007-0035, "Waste Discharge Requirements General Order for Existing Milk Cow Dairies," (2007 Dairy Order)
39. Order No. R5-2013- 0122, "Reissued Waste Discharge Requirements General Order for Exisiting Milk Cow Dairies," (2013 Dairy Order)
40. The Administrative Record of all Public Hearings and Public Input, upon which Order No.s R5-2007-0035 and R5-2013- 0122 were based and adopted.

41. Water Quality Control Plan for the Tulare Lake Basin (2nd ed., 1995) and subsequent amendments thereto.
42. State Board Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California."
43. Final Report of Brown, Vence & Associates, "Review of Animal Waste Management Regulations – Task 4 Report (November, 2004)."
44. Study Findings, Recommendations, and Technical Report (Parts I & II) of the University of California Extension, entitled "Manure Waste Ponding and Field Application Rates (March, 1973).
45. NRCS Guidelines for Water Treatment Lagoons, Natural Resources Conservation Service Conservation Practice Standards, Code 359 (July, 2000). Please advise if your agency does not have a copy.
46. "Impact of Dairy Operations on Groundwater Quality," a research project conducted and a report prepared by the Lawrence Livermore National Laboratory in cooperation with the State Water Resources Control Board. The report was submitted to the State Board in August, 2009. We believe this report is in the possession of the Regional Board, and if it is not, please advise.
47. "Fate and Transport of Waste Water Indicators: Results from Ambient Groundwater and from Groundwater Directly Influenced by Wastewater," a report prepared by the Lawrence Livermore National Laboratory in connection with the State Water Resources Control Board. We believe this report is in the possession of the Regional Board, and if it is not, it is available at the State Board's website:
<http://www.swrcb.ca.gov/gamadocs.shtml>.
48. Jorge Bacca's (Regional Board) reporting data by herd size for both 2007 and 2010.

[The documents listed as 49 through 53 below were attached as exhibits to our Submission of Evidence and Policy Statement submitted to the Regional Board on June 19, 2012 in connection with ACLC R5-2012-0542]

49. California Dairy Herd Improvement Association (DHIA) dairy herd size and numbers, Central Valley, 2011. (As Exhibit 1)

50. San Francisco Bay Regional Water Quality Control Board Resolution No. R2-2003-0094. (As Exhibit 2)

51. San Francisco Bay Regional Water Quality Control Board, Annual Certification Reporting Form, Dairy Waiver Compliance Documentation (As Exhibit 3)

52. North Coast Regional Water Quality Control Board Order No. R1-2012-0002. (As Exhibit 4).

53. North Coast Regional Water Quality Control Board Order No. R1-2012-0003. (As Exhibit 5)

[The documents listed as 54 through 67 below were attached as exhibits to our Petition for Review to the State Board, dated May 30, 2012. A copy of the same was mailed to the Regional Board on the same date.]

54. Letter to Sweeneys from Dale Essary, dated August 22, 2011 (As Exhibit 1).

55. Letter from Sweeneys to Dale Essary, dated September 30, 2011 (As Exhibit 2).

56. Letter to Sweeneys from Douglas Patteson, dated November 9, 2011 (As Exhibit 3).

57. Letter from Sweeneys to Dale Essary, Douglas Patteson, and Clay Rodgers, dated November 29, 2011 (As Exhibit 4).

58. Letter to Sweeneys from Douglas Patteson, dated December 7, 2011 (As Exhibit 5).

59. Letter from Sweeneys to Douglas Patteson, Dale Essary, and Clay Rodgers, dated January 17, 2012 (As Exhibit 6).

60. Certified letter to Sweeneys from the Regional Board (Groundwater Monitoring Directive) (Pamela C. Creedon) dated May 4, 2012 (As Exhibit 7).

61. Letter from Sweeneys to Clay Rodgers, dated May 11, 2012 (As Exhibit 8).

62. Letter to Sweeneys from Douglas Patteson, dated May 23, 2012 (As Exhibit 9).

63. Email from Clay Rodgers to Sweeneys, dated May 27, 2012 (As Exhibit 10).

64. Webpage of Dairy Cares Central Valley Dairy Representative Monitoring Program and Fact Sheet (<http://www.dairycares.com/CVDRMP>) (As Exhibit 11).

65. Letter from Sweeneys to Douglas Patteson and Dale Essary, dated May 29, 2012 (As Exhibit 12).
 66. Email to Sweeneys from J. P. Cativiela of the Central Valley Dairy Representative Monitoring Program, dated May 29, 2012 (As Exhibit 13).
 67. Letter to Sweeneys from Dale Essary, dated July 19, 2012.
 68. Letter from Sweeneys to the Regional Board, dated March 26, 2013.
 69. Letter to Sweeneys from the Regional Board, dated April 19, 2013.
 70. Opinion of the Court of Appeal for the Third Appellate District in the case of *Asociacion de Gente Unida por el Agua, et al. v. Central Valley Regional Water Quality Control Board*, (2012) 210 Cal. App. 4th 1255.
 71. Order of the Superior Court of the State of California for the County of Sacramento in the case of *Asociacion de Gente Unida por el Agua, et al. v. Central Valley Regional Water Quality Control Board*, dated April 16, 2013, Case No. 34-2008-00003604CU-WM-GDS. **[Attached to this Statement as Exhibit A]**
 72. Letter from us to the Regional Board, dated August 26, 2013.
- [The document listed as 73 was attached as Exhibit A to our Petition for Review to the State Board, dated August 21, 2013. A copy of the same was mailed to the Regional Board on the same date.]
73. A peer-reviewed paper entitled, "When Does Nitrate Become a Risk for Humans?," authored by David S. Powlson, Tom M. Addicott, Nigel Benjamin, Kenneth G. Cassman, Theo M. de Kok, Hans van Grinsvin, Jean-Louis L'hirondel, Alex A. Avery and Chris Van Kessel, and published in the *Journal of Environmental Quality* 37:291-295 (2008).
 74. A peer-reviewed paper entitled, "Saturated Zone Denitrification: Potential for Natural Attenuation of Nitrate Contamination in Shallow Groundwater Under Dairy Operations." The paper was prepared by Lawrence Livermore National Laboratory and the University of California, Davis, and was published in *Environmental Science and Technology*, 41:759-765 (2007). We sent the Regional Board a copy of this paper on October 29, 2013.

D. Witnesses.

1. Jim Sweeney. His arguments are set forth herein. He will take 20 minutes.
2. Matthew Sweeney, son of discharger. He may present some of the arguments set forth herein. He may take 10 minutes.

3. Clay L. Rodgers. He may be called to admit the facts regarding the Dairy Cares RMP. It will take 5 minutes.
4. Dale E. Essary. The same as above.
5. Douglas K. Patteson. The same as above.

We also reserve our right to use other evidence and witnesses not listed above if any come to light during the course of continuing to develop our case. We will notify you when such evidence or witnesses become known.

E. Legal Arguments and Analysis.

1. The 2007 Dairy Order is presently invalid and unenforceable because the Sacramento Superior Court ordered the Order set aside on April 6, 2013.

The 2014 Complaint alleges in paragraph 8 “that the Court’s decision did not affect the reporting requirements of the 2007 General Order” We disagree. As of July 1, 2014, the deadline specified by the 2007 Dairy Order for submission of the 2013 Annual Report to the Regional Board, the Trial Court had already ordered that the 2007 Order be set aside. The Trial Court’s order was occasioned by the Third District Court of Appeal finding on November 6, 2012 that “The 2007 Order’s monitoring plan upon which the order relies to enforce its no degradation directive is inadequate” because “there is not substantial evidence to support the findings.”³ Hence, many of the elements to be reported in the Annual Report were based upon a monitoring plan in the 2007 Order that the Appellate Court determined was flawed and unlawful.

However, suppose a court were to conclude that the April 6, 2013 order of the Trial Court to the Regional Board to set aside the 2007 Dairy Order did not have the effect of barring the Regional Board from seeking a civil liability assessment for our failure to file the 2012 Annual Report required under said Order. In such event, would would contend that the 2007 Dairy Order was still unlawful and unenforceable for all of the following reasons:

2. The 2007 Dairy Order is unlawful and unenforceable against us because it failed to comply with applicable law, including provisions of the Water Code and Government Code.

(a) The need for the 2007 Dairy Order was not supported by substantial evidence.

It is fundamental administrative law that no rule or regulation of a state agency is valid and enforceable unless the administrative record shows that it is supported by substantial evidence. The Appellate Court in the *Asociacion* case cited herein confirmed the applicability of the foregoing precept.⁴ Part of the reason the Appellate

³ *Asociacion*, p. 1287.

⁴ *Ibid*, p. 1282.

Court overturned the Trial Court's original decision was because "the Regional Board must ensure that sufficient evidence is analyzed to support its decision [to adopt the 2007 Dairy Order] and that the evidence is summarized in an appropriate finding."⁵ It went on to add that "An administrative agency abuses its discretion where its order is not supported by the findings or where the findings are not supported by the evidence. (citation).⁶ It concluded that "The 2007 Order's monitoring plan upon which the order relies to enforce its no degradation directive is inadequate" because "there is not substantial evidence to support the findings."⁷

We have reviewed all 34,000 pages of the administrative record of the hearings held in connection with the adoption of the 2007 Dairy Order, and we found no substantial evidence in the administrative record – in fact, no evidence whatsoever – that supports the need to replace the pre-2007 Order reporting requirements with the new reporting requirements adopted in the 2007 Order. We found no substantial evidence in the record that the data, reports and information that the Regional Board staff obtained from or about dairies prior to its adoption of the 2007 Dairy Order were inadequate, insufficient, unreliable or otherwise flawed. And we have found no substantial evidence in the record that claimed or demonstrated that the new reporting requirements were necessary or needed to replace the pre-2007 Order requirements. We have made this argument to the Regional Board in connection with the 2011, 2012 and 2013 Complaints. This argument stands unchallenged and uncontroverted because, in each instance, the Regional Board staff has failed to argue or show otherwise.

(b) The Regional Board did not show the need for the reports specified in the 2007 Dairy Order and did not justify their burden, as required under Water Code section 13267 (b)(1).

The "Monitoring and Reporting Program" of the 2007 Dairy Order recites that it is issued pursuant to Water Code Section 13267. (2007 Dairy Order, p. MRP-1) Section 13267 (b) (1) states that "the regional board may require that any person who ... discharges ... waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

Section 13267 (b) (1) goes on to say that "The burden, including costs, of the reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports. In requiring these reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

The Regional Board failed to comply with section 13267 in that the 2007 Dairy Order does not contain "a written explanation with regard for the need for the reports," and

⁵ Ibid.

⁶ Ibid.

⁷ Ibid., p. 1287.

it fails to "identify the evidence that supports requiring [us] to provide the reports." In addition, the Regional Board never provided us with "a written explanation with regard for the need for the reports," and it did not "identify the evidence that supports requiring [us] to provide the reports."

Over the years, the Regional Board's staff visited our dairy site to inspect and obtain information about it. For example, staff member Ken Jones visited our dairy in 2003 and spent one day gathering information. He measured and calculated the storage capacity of our three waste water lagoons and concluded that our storage capacity exceeded what the Regional Board required. In fact, it was 128% of what was required. He also concluded that we had sufficient cropland for application of waste water. We have his letter dated April 17, 2003, confirming that our dairy was in full compliance with all Regional Board requirements. We are prepared to submit evidence that our dairy has essentially the same number of animals, the same lagoon capacity and even more cropland now than we had in 2003.

A dairy has been continuously operating on our site for over eighty years. The Regional Board required us to provide it with supply well test results. Indeed, its 2007 Order orders dairymen, on page MRP-7 to "sample each domestic and agricultural supply well" and to submit the test results for Nitrate-nitrogen to it on an annual basis.

In accordance with the Regional Board's requests, we submitted test results from water samples taken from each of our supply wells in 2003, 2007 and 2010. The results ranged between .2 and 3.4 mg/L, all incredibly low levels. All well results were and are substantially below the state's maximum contaminant levels (MCL); in fact, they are incredibly low.

We argued to the Regional Board staff that these test results are compelling evidence that our operation was and is not adversely impacting ground water, and therefore the cost of filing these reports did not and do not, in the words of Section 13267, "bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports."

Despite the Regional Board's prior requests for supply well test results and despite the 2007 Order requiring them, the Board's staff brushed off these results by telling us that "Groundwater supply wells are typically screened in deeper aquifer zones ... groundwater quality data collected from the Dairy's on-site supply wells do not necessarily represent the quality of first encountered groundwater beneath the Dairy." If this was the case, why did the Regional Board require them?

(c)The 2007 Dairy Order failed to implement the most modern and meaningful scientific findings and technologies.

Section 13263 (e) of the Water Code provides that “any affected person may apply to the regional board to review and revise its waste discharge requirements. All requirements shall be reviewed periodically.” If new and more cost effective ways can accomplish the same purpose, we contend that the above section imposes on the Regional Board a legal duty to review such issues and revise its requirements accordingly. In fact, the Appellate Court in the *Asociacion* case confirmed that “the agency [the Regional Board] should consider current technologies and costs”⁸

New and old research and advanced technologies presently exist which may provide less expensive means for evaluating groundwater contamination risk, of determining non-contamination of groundwater, and of using less expensive practices that can still prevent such contamination.

At various times in the past, we have provided the Regional Board with relevant research papers to consider. For example, Lawrence Livermore National Laboratory published two papers in *Environmental Science Technology*, (2007) 41, 753-765. (The State Board has copies) in which they stated that they discovered that soil bacteria break down and eliminate nitrates in dairy waste water in a substantial if not complete degree. They also ascertained that there are certain compounds and gasses in manure water that can be used to determine whether water from dairy lagoons or from waste applied in irrigation water has infiltrated into first encountered groundwater. There are also simple and inexpensive ways to show the amount of highly compacted clay layers sitting beneath a dairy site and whether they constitute an impervious barrier between the dairy and the groundwater. Yet, the 2007 Dairy Order contains a “one-size-fits-all” approach, and generally requires reports that provide little to no meaningful information. Indeed, some of these reports are ludicrous and unnecessary. One example is that we were required to provide monthly photos of our lagoons to show that the water level was not too high during the month. This is as absurd as requiring us to photograph our speedometer once each month to prove we didn’t drive over the speed limit during the month.

We have read all 34,000 pages of the administrative record leading up to the adoption of the 2007 Dairy Order. We found no substantial evidence in the record that supports or justifies the need to regulate nitrates, considering the levels found in the groundwater of the Central Valley. Indeed, a peer-reviewed paper entitled “When Does Nitrate Become a Risk for Humans?”, co-authored by nine scientists from the U.S., the UK, France, Germany and the Netherlands, and published in 2008 in the *Journal of Environmental Quality*, have evaluated all the old studies done about the health impacts of nitrates on humans and it suggests that nitrates at the levels found in groundwater are not the health threat once believed. The paper further suggests that

⁸ Ibid., p. 1283.

perhaps the current nitrate limits should be significantly raised because the health risks may be overstated.

In short, the 2007 Dairy Order's reporting requirements were excessive, unnecessary, overly burdensome, primitive, antiquated, obsolete, and provide nothing of real value, except for lining the pockets of engineers, consultants and laboratories. The Regional Board did not sufficiently examine and consider recent research results and advanced testing technologies, and it did not modify its 2007 Order accordingly. We have made these arguments to the Regional Board during the hearings on the 2011 Complaint, the 2012 Complaint and on the 2013 Complaint. In each instance, these arguments were never challenged, disputed or rebutted by the Regional Board staff or their counsel.

(d) The 2007 Dairy Order failed to take into account economic considerations.

The 2007 Order's waste discharge requirements as they relate to water quality objectives must take into account economic considerations. (Water Code Sections 13241 and 13263 (a)) The 2007 Order does not do so. It specifically fails to set or implement water quality objectives that are within the economic means of smaller dairies – operations that have to deal with disproportionately higher per cow reporting costs. Indeed, the Order fails to address the special economic circumstances of smaller dairies in any way whatsoever.

Small dairies are under much greater economic stress than larger, more efficient dairies and, therefore, are less able to handle the high costs of complying with the 2007 Order's reporting requirements.

The administrative record (AR) of the 2007 Order consists of 34,000 pages of documents and testimony. A great deal of testimony was presented concerning how expensive the new reporting requirements would be, and how especially unbearable it would be for smaller dairies. (See AR 002089, AR 000384, AR 000444, AR 007297, AR 02397, AR 019632, AR 002163, and AR 000583)

As an example of how the 2007 Order adversely affected smaller dairies, Dairy Cares of Sacramento estimated the average cost for a dairy to install their own individual monitoring well system to be \$42,000.00, and thousands of dollars each year thereafter for ongoing sampling, testing and reporting. The cost of monitoring well programs, both the installation and the periodic reporting costs, are for the most part the same for large dairies as they are for small dairies. This means that the costs, on a per cow basis, are dramatically higher for small dairies, and contribute to small dairies being at a competitive disadvantage. Section 13241 of the Water Code requires the Regional Boards to take into account "economic considerations" in connection with its water quality objectives.

The administrative record contains no economic analysis or evidence that disputed the abundant testimony that the proposed 2007 Order would be harmful, even fatal, to smaller dairies.

We requested data from the Regional Board staff that would reveal the report filing compliance rate of dairies, broken down by herd size. In response to our request, Jorge Baca, from the Regional Board, provided us with data concerning the dairies dealt with by its Fresno office. But the compliance rate is not what is most meaningful in this data. Rather it is the rate of loss of dairies, by herd size, since the adoption of the 2007 Order.

This data shows the following with respect to the dairies that provided reports to the Fresno office:

Herd Size	2007	2010	Attrition
Less than 400 cows	56	30	-26 = 46% attrition
400 to 700 cows	92	62	-30 = 32% attrition
Over 700 cows	485	455	-30 = .6% attrition
Total	633	547	-86 = 13% overall attrition

In other words, only about half the number of smaller dairies filed reports in 2010 as compared to the number of smaller dairies that filed reports in 2007.

Not only are small dairies less able to deal with the high regulatory costs, they pose a dramatically smaller threat to the groundwater. California DHIA data shows that DHIA dairies in the San Joaquin Valley of our size or smaller represent less than 1/10 of 1% (.09%) of all DHIA cows in the San Joaquin Valley.

Other agencies recognize these facts. Both the North Coast Regional Water Quality Control Board and the San Francisco Bay Regional Water Quality Control Board have recognized how smaller dairies have a much smaller impact on groundwater, and how they are less able to bear the same regulatory expenses and burdens that larger dairies can. These Regional Boards saw fit to adopt special performance and reporting relief for dairies under 700 cows (See Orders R1-2012-003 and R2-2003-0094, respectively).

In the case of the North Coast Region's Order R1-2012-0003, it declares that "this Order applies to dairies that pose a low or insignificant risk to surface water or groundwater." The Order goes on to say that "economics were considered, *as required by law*, during the development of these objectives," and "that a waiver of WDRs [waste discharge requirements] for a specific type of discharge is in the public best interest."

In the case of the San Francisco Bay Region, it requires smaller dairies to complete and file a two-page "Reporting Form" which does not require the involvement of expensive engineers.

In addition, the SJ Valley Air Pollution Control District exempts smaller dairies from many of its requirements.

Significantly, the Regional Board adopted such an approach when it adopted its Irrigated Lands Orders in 2013. It put smaller farms into a special category.

Despite all of the foregoing, the Regional Board has refused to adopt any waivers, or make any special provisions for, or grant any reporting relief to smaller dairies, and none appeared in its 2007 Dairy Order or in its 2013 Dairy Order. Its refusal not only violated the law, but it put smaller dairies in the Central Valley region at a greater competitive disadvantage with larger dairies in the Central Valley, and at a competitive disadvantage with small dairies in the North Coast and San Francisco Bay regions.

(c) The Regional Board has failed to show the “need” for us to install an individual groundwater monitoring system on our dairy site, or to join a Representative Monitoring Program.

1. The 2014 Complaint alleges in paragraph 12 that “The Discharger [us] is alleged to have violated the following sections of the Reissued General Order [2013 Dairy Order] and of the MRP:

A) Provision G. 3 of the Reissued General Order, which states:

“The Discharger shall comply with the attached Monitoring and Reporting Program R5-2013-122 which is part of this Order, and future revisions thereto, or with an individual monitoring and reporting program, ...”

Although the allegation is ambiguous, it appears that the 2014 Complaint is charging us with failure to either (1) install an individual groundwater monitoring well system on our dairy site, or (2) to join a Representative Monitoring Program.

2. The Regional Board’s staff first informed us by letter dated August 22, 2011 that we would need to either install our own individual groundwater monitoring system at our dairy, or we would have to join a representative monitoring program (RMP) that would monitor groundwater at a set of representative facilities. In a letter we sent to the staff on September 30, 2011, we pointed out that Water Code section 13267 obligates a regional board to “provide a person with a written explanation with regard to the need for the reports,” and that “these reports shall bear a reasonable relationship to the need for the reports.” In order to determine the “need” for these groundwater monitoring well test reports, we wanted to ascertain how meaningful they needed to be in order for them to be acceptable. For this reason, we asked, “Where are their [Central Valley Representative Monitoring Program – CVRMP] monitoring wells located that would serve as the basis of information for our site?”

3. The Board's staff responded to our letter by letter dated November 9, 2011, but the letter never answered our question about the locations of the CVRMP groundwater wells. We had to ask again in a letter we sent Mr. Essary on November 29, 2011 as to the location of these CVRMP wells. Yet, the responding letter to us dated December 7, 2011 again failed to answer this very specific and direct question. We sent Clay Rodgers a letter dated May 11, 2012, which again called to his attention the obligations imposed by section 13267. Yet, we were sent another letter, this one dated May 23, 2012, that again failed to provide us with the locations of the CVRMP groundwater wells.

4. On May 4, 2012, the Regional Board issued a Directive, ordering us to implement groundwater monitoring at our dairy. The Directive claimed that it had the authority under section 13267 of the Water Code and under the 2007 Dairy Order (R5-2007-0035) to require us to do so. This Directive was communicated to us by letter dated May 23, 2012. One of the allegations of this Complaint is that we have violated this Directive and the 2007 Dairy Order by failing to install a groundwater monitoring system.

The relevant language of section 13267 of the Water Code reads: "the regional board may require that any person ... who ... discharges ... within its region ... shall furnish ... monitoring program reports which the regional board requires. The burden, including costs, shall bear a reasonable relationship for the need for the report and the benefits to be obtained from the reports. In requiring these reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring the person to provide the reports."

The Regional Board also cited the following language found on page MRP-16 of the 2007 Order: "Pursuant to Section 13267, the Executive Officer will order Dischargers to install monitoring wells to comply with Monitoring and Reporting Program Order No. R5-2007-0035 based on an evaluation of the threat to water quality *at each dairy*. It is anticipated that this will occur in phases of 100 to 200 dairies per year." [Find comparable language in 2013 Order]

Both provisions indicate that the determination of whether to require a given dairy to provide monitoring well reports is to be made on a dairy-by-dairy, individual basis. Before a dairy can be required to implement a monitoring well program, the Regional Board must be aware of specific and compelling evidence that there is a need for such a costly program, and it must inform the dairyman of what specific evidence regarding his/her dairy supports the requiring of such reports.

Despite the foregoing, the Regional Board expressed the position in its May 23, 2012 letter that the foregoing language in the 2007 Order gave it the right to require *all dairies*, in phases of "100 to 200 dairies," to install monitoring well systems. Indeed, the letter states that the Regional Board has issued directives to 260 dairymen to implement monitoring well programs, and that 1000 dairies have already joined

"Representative Monitoring Programs." This statement implies that *all dairies* in the Central Valley region either already participate or are being ordered to do so, without any effort being made by the Regional Board to evaluate each dairy individually. Thus, it appears that the Regional Board engaged in a direct violation of the plain language of section 13267 and the 2007 Order, and flagrantly violated its duties and obligations under the applicable laws.

Section 13263 of the Water Code provides that a Regional Board may prescribe requirements for dischargers, which it did in adopting the 2007 Order. However, section 13269 states that the Regional Board can waive any of these requirements, including the monitoring requirements, as it applies to "an individual" by considering "relevant factors."

We consistently called to the staff's attention that our dairy has continuously been the site of a dairy for over 80 years. We pointed out to the Regional Board's staff that the nitrate-nitrogen test results from our domestic and agricultural supply wells, which we began submitting in 2003. The results have ranged between .2 and 3.4 mg/L, all incredibly low levels. Yet, the Regional Board brushed off these results by stating that "Groundwater supply wells are typically screened in deeper aquifer zones ... groundwater quality data collected from the Dairy's on-site supply wells do not necessarily represent the quality of first encountered groundwater beneath the Dairy."

The Regional Board had the audacity to say this after demanding for ten years that we test our supply wells and send them the results. And they had the audacity to say this despite their 2007 Order, on page MRP-7, actually ordering dairymen to "sample each domestic and agricultural supply well," and submit the laboratory analysis for nitrate-nitrogen to it on an annual basis. After demanding these costly reports for over ten years they now tell us that they are meaningless. Absolutely outrageous!

To make matters worse, the Regional Board has been advising dairymen, including us, that as an alternative, we can join a "Representative Monitoring Program," and the results from monitoring wells that are not even close to a dairy can be submitted and they will be treated as satisfying the monitoring well requirement.

I wrote Douglas Patteson on May 27, 2012, and asked him what representative monitoring program the Regional Board would accept for my dairy. Clay Rodgers emailed me the same day and advised me that the Central Valley Dairy Representative Monitoring Program (CVDRMP), administered by Dairy CARES in Sacramento, covered Tulare County and that it would be an acceptable RMP for my dairy. I checked with Dairy CARS/CVDRMP and was advised by email dated May 29, 2012 that it would accept my application to join the program. I also discovered that the nearest CVDRMP monitoring wells were about 45 miles from my dairy. And this was going to be treated by the Regional Board as meaningful information for our dairy?

5. Mr. Essary sent us a letter dated July 19, 2012 reminding us of our need to install groundwater monitoring wells on our dairy or join an RMP. He threatened us with action if we did not comply, and he completely ignored our previous request for the locations of the RMP wells. We responded with a letter dated March, 26, 2013, in which we again asked for the location of the CVRMP groundwater wells. He sent us a letter dated April 19, 2013, which completely ignored our question, but warned us that the Regional Board would issue a Complaint against us if we did not install a monitoring well system on our dairy or join an RMP. [add allegation of filing appeal of Directive]

6. The Regional Board's incoherent behavior undermines its position. On the one hand, it has demanded supply well test results for over ten years, then rejects them as meaningless. It then demands we install monitoring wells on our dairy because these results would be more meaningful. Then it says that if we (and 1200 other dairymen) join an RMP, whose closest monitoring wells are many miles from our dairy, this would be an acceptable substitute and would satisfy their monitoring well requirements.

7. The way in which the Regional Board's staff continuously dodged answering our requests as to the location of the CVRMP monitoring wells would make anyone suspicious. The reason they refused to answer our questions about the location of the CVRMP groundwater wells is transparently clear; because these RMP wells that are so far removed from most dairies they provide no meaningful information about what is going on at the dairy in question. In other words, the RMP with Dairy CARES is a fraud and a sham. Most significantly, however, by accepting enrollment in an RMP as a substitute for an individual groundwater monitoring well system on a dairy (as they have for over 1200 dairies), the Regional Board has revealed that it does not have the "need" required under Water Code section 13267(b)(1) for individual groundwater monitoring wells on the dairy site itself.

F. The assessment analysis is flawed and improper, and the 2014 Complaint is an abuse of power and process and a violation of our civil rights.

The Regional Board staff is asking that the civil liability assessment in the 2014 Complaint be enhanced because this is the fourth year that we have failed to file Annual Reports. Indeed, the Complaint seeks an initial liability of \$5,950.00, then adjusts it upward to \$18,564 based upon our failure to file these earlier Annual Reports required under the 2007 Dairy Order.

The Regional Board staff knows that we have opposed these earlier Complaints (2011, 2012, and 2013), and it knows that we have appealed each of the Regional Board's

decisions to the State Board by filing Petitions for Review, a recourse expressly afforded us under Water Code section 13320.

We were prepared to comply with these reporting requirements if, after we had exhausted the appeal remedies afforded us by law, the 2007 Order's provisions had been upheld as lawful and enforceable. We commenced the appeal process with the expectation that the State Board would decide our Petitions for Review in a punctual and timely manner. Yet, almost three years after filing our first appeal, all three of these prior appeals are still pending before the State Board.

It is improper to assign fault to us because of the State Board's inaction in deciding the merits of our appeals. The Regional Board should complain to the State Board for its inaction in these matters, rather than to trying to punish us for the inaction.

It is ironic that the Trial Court's order to set aside the *entire* 2007 Dairy Order in the *Asociacion* case constitutes the very relief that we were seeking in our appeals. Rather than order limited parts of the Order to be set aside, it seems significant that the Trial Court ordered the *entire* 2007 Order be set aside. We believe that the Trial Court's order has rendered our appeals moot. Hence, it is almost certain that the State Board will not act upon these appeals now.

In view of all of the circumstances outlined above, we believe this 2014 Complaint is entirely without merit, constitutes a blatant abuse of power and process, and violates our civil rights. In schoolyard terms, it would be characterized as "bullying."

G. We object to the Regional Board's attorneys engaging in a conflict of adverse interests.

We are aware that the attorney advising the Advisory Team and the attorneys advising the Prosecuting Team are all employees of the State Water Resources Control Board. In addition, the State Board is the public agency to which we must appeal any adverse ruling by the Regional Board. Such a situation constitutes a clear conflict of adverse interests. Under the State Bar's Rules of Professional Conduct, attorneys employed by the same public agency are treated the same as attorneys working for the same private law firm. The Rules proscribe attorneys from the same "firm" representing and advising adverse interests.⁹ The situation in which State Board's attorneys are placing themselves is tantamount to attorneys from the same law firm advising the plaintiff, the judge and the appellate court to which the case is appealed. Such conflicts of adverse interests must be fully disclosed to the parties and are not permitted unless all parties to the matter

⁹ California State Bar Rules of Professional Conduct, Rules 1-100, 3-310 and 3-320.

expressly waive the conflict. We do not waive it. This is a situation that the State Bar vigilantly strives to prevent, and it has a robust history of imposing discipline on offending attorneys.

Respectfully submitted,

James G. Sweeney

Amelia M. Sweeney

cc.

Electronic copies only:

Patrick Pulupa

Naomi Kaplowitz

Hard copies only:

Pamela Creedon

Andrew Altevogt

Clay Rodgers and Doug Patteson

Electronic and hard copies:

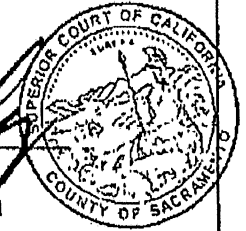
Dale Essary

Exhibit A

1 IT IS SO ORDERED, ADJUDGED, AND DECREED.

2
3 Dated: April 17, 2013

Timothy M. Frawley
Timothy M. Frawley
Judge of the Superior Court of California
County of Sacramento



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7 APPROVED AS TO FORM:

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9 Date: _____

Laurel Firestone
Laurel Firestone
Community Water Center
Attorney for Petitioners Asociacion De Gente Unida
El Agua and Environmental Law Foundation

12
13 Date: _____

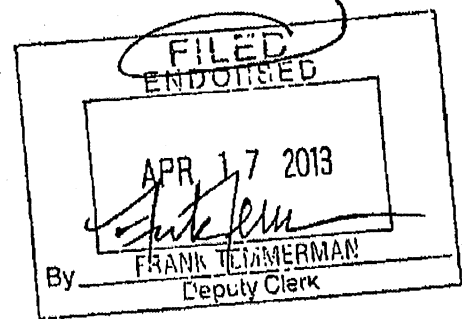
Lynne Saxton
Lynne Saxton
Saxton & Associates
Attorney for Petitioners Asociacion De Gente Unida
El Agua and Environmental Law Foundation

16
17
18 Date: _____

Teri Ashby
Teri Ashby
Office of the Attorney General of California
Attorney for Respondent Central Valley Regional
Water Quality Control Board

21
22
23 Date: _____

Theresa Dunham
Theresa Dunham
Somach Simmons & Dunn
Attorney for Intervenor Community Alliance for
Responsible Environmental Stewardship



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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

ASOCIACION DE GENTE UNIDA POR EL
AGUA, a California unincorporated association,
and ENVIRONMENTAL LAW FOUNDATION,
a California nonprofit organization,

Petitioners,

v.

CENTRAL VALLEY REGIONAL WATER
QUALITY CONTROL BOARD, a California
state agency,

Respondent.

COMMUNITY ALLIANCE FOR
RESPONSIBLE ENVIRONMENTAL
STEWARDSHIP, a California corporation,

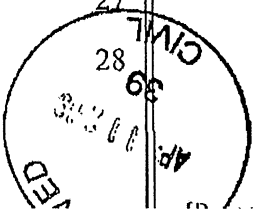
Intervenor

Case No. 34-2008-00003604-CU-WM-
GDS
(Related Case No. 2008-00003603-CU-
WM-GDS)

~~PROPOSED~~ WRIT OF MANDATE

Honorable Timothy M. Frawley
Dept. 29

BY FAX



1 To Defendant/Respondent Central Valley Regional Water Quality Control Board:

2 YOU ARE HEREBY COMMANDED, under seal of this Court, to do the following:

3 1. Set aside the Waste Discharge Requirements General Order for Existing
4 Milk Cow Diaries (Order No. R5-2007-0035) and reissue the permit only after application of, and
5 compliance with, the State's anti-degradation policy (Resolution No. 68-16), as interpreted by the
6 Court of Appeal in its opinion, including, without limitation, adequate findings that any allowed
7 discharges to high quality water:

- 8 a. Will be consistent with maximum benefit to the people of the State;
9 b. Will not unreasonably affect present and anticipated beneficial use of
10 the affected waters;
11 c. Will not result in water quality less than that prescribed in applicable
12 water quality objectives; and
13 d. That waste-discharging activities will be required to use the best
14 practicable treatment or control of the discharge necessary to assure that:
15 i. A pollution or nuisance will not occur, and
16 ii. The highest water quality consistent with the maximum benefit
17 to the people of the State will be maintained.

18 2. The writ further commands Defendant/Respondent to make and file a
19 Return within 180 days, setting forth what they have done to comply.

20 3. Plaintiffs/Petitioners shall recover their costs on appeal in the amount of
21 \$3,485.63, as reflected in the Notice of Amended Costs on Appeal, filed February 22, 2013.

22 4. The Court retains jurisdiction to consider any motions for an award of
23 attorneys' fees.
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25
26
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28



EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Central Valley Regional Water Quality Control Board

8 July 2014

James G. & Amelia M. Sweeney (owner/operator)
Sweeney Dairy
30712 Road 170
Visalia, CA 93292

CERTIFIED MAIL
7013 2250 0002 0464 4079

FORTHCOMING ASSESSMENT OF CIVIL LIABILITY FOR FAILURE TO SUBMIT THE ANNUAL REPORT FOR 2012, SWEENEY DAIRY, WDID 5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY

The Central Valley Regional Water Board (Central Valley Water Board) has requested that the State Water Resources Control Board, Office of Enforcement, assist it in bringing formal enforcement in administrative civil liability for failing to submit the annual report for 2012 required pursuant to Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (2007 General Order) and later replaced by Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (Reissued General Order). The Central Valley Water Board intends to proceed with formal enforcement by issuing an Administrative Civil Liability Complaint (Complaint); however, prior to prosecuting this case, we offer the opportunity to discuss the alleged violation, including the option of settlement.

The Reissued General Order and the accompanying Monitoring and Reporting Program (MRP) required, pursuant to section 13267 of the California Water Code, that an Annual Report for the calendar year 2012 (2012 Annual Report) be submitted for regulated facilities by 1 July 2013. On 22 August 2013, Central Valley Water Board staff issued a Notice of Violation notifying you that the 2012 Annual Report had not been received for your dairy facility. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to avoid incurring any additional liability. To date, the Central Valley Water Board has not received the 2012 Annual Report.

Failing to submit the annual report subjects you to civil penalties pursuant to section 13268 of the Water Code of up to one thousand dollars (\$1,000) for each day the violation occurs.

Further delay in submitting the annual report subjects you to ongoing penalties. The maximum penalty as of 19 June 2014 for this violation is three hundred fifty-three thousand dollars (\$353,000), based on a calculation of the cumulative total number of per-day violations times the statutory maximum penalty (353 total days of violation X \$1,000). Consistent with the State Water Resources Control Board's Water Quality Enforcement Policy, the Assistant Executive Officer of the

KARL E. LONGLEY ScD, P.E., CHAIR | PAMELA C. CREEDON P.E., BCEE, EXECUTIVE OFFICER

1685 E Street, Fresno, CA 93706 | www.waterboards.ca.gov/centralvalley

8 July 2014

Central Valley Water Board intends to issue you a Complaint in the amount of eighteen thousand five hundred sixty-four dollars (\$18,564) for this violation. This recommended penalty amount is further explained in Attachment A. Please note, as long as you remain out of compliance, the Assistant Executive Officer reserves its authority to issue a Complaint in an amount that exceeds the penalty calculated in Attachment A.

By way of this letter, you are being notified of the opportunity to meet with Central Valley Water Board staff prior to the issuance of the Complaint to discuss the alleged violation and proposed penalty amount. If you wish to schedule an appointment to discuss this matter, contact Dale Essary at (559) 445-5093 no later than **11 July 2014**. If the Central Valley Water Board does not receive a response by this date, the Assistant Executive Officer will issue a complaint and this matter will proceed to a formal enforcement hearing before the Central Valley Water Board.

If you have any questions regarding this notice, please contact Dale Essary by phone at (559) 445-5093 or by email at Dale.Essary@waterboards.ca.gov.



DOUGLAS K. PATTESON
Supervising WRC Engineer

cc: Mr. Andrew Altevogt, Central Valley Water Board, Rancho Cordova
Mr. Clay Rodgers, Central Valley Water Board, Fresno
Ms. Naomi Kaplowitz, Office of Enforcement, SWRCB, Sacramento
Mr. David Boyers, Office of Enforcement, SWRCB, Sacramento
Tulare County Health & Human Services Agency, Environmental Health, Visalia
Tulare County Resource Management Agency, Code Compliance, Visalia

Attachment A – Pre-Complaint Letter
Specific Factors Considered – Civil Liability
James G. & Amelia M. Sweeney
Sweeney Dairy

The Central Valley Water Board alleges that the Discharger failed to submit the 2012 Annual Report required to be submitted by 1 July 2013. For the purpose of applying the Enforcement Policy's administrative civil liability methodology, the alleged violation is a non-discharge violation. Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

- 1. Violation No. 1 (Failure to submit 2012 Annual Report):** In accordance with the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (Reissued General Order) and the accompanying Monitoring and Reporting Program (MRP), a 2012 Annual Report must be submitted for regulated facilities by 1 July 2013. To date, the Owner and/or Operator (hereinafter the Discharger) has not submitted this report for the Sweeney Dairy.

Calculation of Penalty for Failure to Submit 2012 Annual Report

Step 1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.35.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to submit the 2012 Annual Report did not increase the amount of pollution discharged or threatened to discharge into waters of the State. The submission of an Annual Report is a means through which the Central Valley Water Board can evaluate a Discharger's compliance with the Reissued General Order. Failing to timely submit the Annual Report to the Central Valley Water Board hinders the Board's ability to follow-up with noncompliance and such circumstances present at least a minor potential for harm. The deviation from requirements was determined to be major, as the requirement to submit the Annual Report has been rendered ineffective. The failure to submit the required technical report undermines the Central Valley Water Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the Reissued General Order.

Attachment A – Pre-Complaint Letter Sweeney Dairy

Initial Liability

The failure to submit annual reports is an enforceable violation under Water Code section 13268(b)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2012 Annual Report by 1 July 2013 as required by the Reissued General Order and the MRP, which is now 353 days late.

However, the alternative approach for calculating liability for multiday violations in the Enforcement Policy is applicable. The failure to submit required technical reports does not result in an economic benefit that can be measured on a daily basis. The Discharger only receives an economic benefit by not submitting the required technical report, and not a per-day benefit during the entire period of violation.

Applying the per-day factor to the adjusted number of days of violation rounded to the nearest full day equals 17 days of violation. A calculation of initial liability totals \$5,950 (0.35 per day factor X 17 adjusted days of violation X \$1,000 per day penalty).

Step 4. Adjustment Factors

a) *Culpability:* 1.2

Discussion: The Discharger was assessed a score of 1.2, which increases the liability amount. The Discharger is responsible for failing to submit the annual report alleged herein. The requirement to submit a 2012 Annual Report was detailed in the Reissued General Order. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the Reissued General Order, the Discharger continues to fail to comply. Thus, the Discharger had knowledge of the requirement to submit the Annual Report and failed to meet the reasonable standard of care in that regard.

b) *Cleanup and Cooperation:* 1.3

Discussion: The Discharger was assessed a score of 1.3, which increases the liability amount. The Discharger was issued a Notice of Violation on 22 August 2013, which requested that the report be submitted as soon as possible to minimize liability. The Discharger was unresponsive to the NOV, and did not cooperate with the Water Board to come back into compliance. The violation of Water Code section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

Attachment A – Pre-Complaint Letter Sweeney Dairy

c) History of Violations: 2

Discussion: The Discharger was assessed the score of 2, which increases the fine. The Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2011-0068 on 13 October 2011 for the Discharger's failure to submit the 2009 Annual Report and the Waste Management Plan by the required deadlines, as required by the Reissued General Order and the MRP. In addition, the Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2012-0070 on 2 August 2012 for the Discharger's failure to submit the 2010 Annual Report by the required deadline, as required by the Reissued General Order and the MRP. In addition, the Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2013-0091 on 25 July 2013 for the Discharger's failure to submit the 2011 Annual Report by the required deadline, as required by the Reissued General Order and the MRP. The Enforcement Policy requires that a minimum multiplier of 1.1 be used when there is a history of repeat violations.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount: \$18,564* [Initial Liability (\$5,950) x Adjustments (1.2)(1.3)(2)].

Step 6. Ability to Pay and Continue in Business

The Enforcement Policy provides that if the Central Valley Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward.

- a) *Adjusted Total Base Liability Amount: \$18,564*

Discussion: The Discharger has the ability to pay the total base liability amount based on 1) the Discharger owns the Dairy, a significant asset, and 2) the Discharger operates a dairy, an ongoing business that generates profits.

Without additional information provided by the Discharger, based on this initial assessment of information available in the public record, it appears the Discharger has the assets to pay the Total Base Liability. Based on the reasons discussed above, no reduction in liability is warranted.

**Attachment A – Pre-Complaint Letter
Sweeney Dairy**

Step 7. Other Factors as Justice May Require

- a) *Adjusted Combined Total Base Liability Amount:* \$18,564 + \$0 (Staff Costs) = **\$18,564.**
- b) *Discussion:* No staff costs have been assessed as part of this enforcement action.

Step 8. Economic Benefit

- a) *Estimated Economic Benefit:* **\$1,500**

Discussion: The Discharger has received an economic benefit from the costs saved in not drafting and preparing the 2012 Annual Report. This is based on the current consulting costs of producing an Annual Report (\$1,500). The adjusted combined total base liability amount of \$18,564 is more than at least 10% higher than the economic benefit amount (\$1,500) as required by the Enforcement Policy.

Step 9. Maximum and Minimum Liability Amounts

- a) *Minimum Liability Amount:* **\$1,650**

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not fall below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the alleged violation is \$1,500.

- b) *Maximum Liability Amount:* **\$353,000**

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13367(b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could face penalties for the total number of days in violation (353 total days X \$1,000 per day).

The proposed liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the failure to submit the 2012 Annual Report is **\$18,564.**